IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2539 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AMRUTBHAI CHHANIYABHAI TANDEL

Versus

DISTRICT MAGISTRATE

Appearance:

1. Special Civil Application No. 2539 of 2004

MR ANIL S DAVE for Petitioner No. 1

MR KAMEN N SHUKLA for Petitioner No. 1

MS ARCHANA RAVAL, LD.AGP for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 26/07/2004

ORAL JUDGEMENT

1. By filing this petition, the petitioner-detenu has challenged the detention order passed against him by

the detaining authority, by its order dated 21.1.2004 under the provisions of the Gujarat Prevention of Anti-social Activities Act, 1985 ("PASA", for short). The petitioner is detained as a "bootlegger" under PASA. Along with the order, the petitioner was also served with the grounds of detention.

2. In the grounds of detention, there is a reference about three criminal cases registered against the petitioner under the Bombay Prohibition Act. It is alleged that, the petitioner is dealing in foreign liquor. After recording the subjective satisfaction, and after considering the statements of the witnesses, whose names have not been disclosed to the petitioner, the detaining authority has detained him under PASA. The said detention order is challenged by the petitioner by way of this petition.

3. At the time of hearing of this petition, learned Advocate for the petitioner has submitted that, the allegation against the petitioner is that, he is dealing in foreign liquor, and there are only three criminal cases registered against him for alleged breach of the Bombay Prohibition Act, and that itself is not sufficient for coming to the conclusion that the petitioner is disturbing the public order, and therefore, it cannot be said that the petitioner has violated public order, as, at the most, it can be said that there is breach of law and order on the part of the petitioner.

4. Learned advocate for the petitioner submitted that, the names of the witnesses are not disclosed by claiming privilege under Section 9(2) of the PASA. It is submitted that the fear expressed by the so-called witnesses is not believable especially when only three criminal cases are registered against the petitioner under the Prohibition Act and, therefore, under the guise of so-called fear, the names of such witnesses are not disclosed to the petitioner. It is, therefore, submitted that before claiming the privilege under sec.9(2) of the PASA, the authority has not tried to verify about the credentials and character of the detenu. It is further submitted that the privilege is claimed in a routine manner and, therefore, without any basis, the authority has tried to withhold the names of witnesses and as a result of that, the petitioner is denied the valuable right of making effective representation. To substantiate his say, learned advocate for the petitioner has relied upon the decision of this Court rendered in the case of KISHOR NAGJIBHAI PARMAR v. STATE OF GUJARAT, reported in 2000 (4) GLR 3236, wherein it is held in para

11 as under :

"11. In this view of the matter, the detaining authority while exercising powers under Section 9 (2) of the P.A.S.A.Act for claiming privilege is expected to consider the general background, character, antecedents, criminal tendency of propensity etc. of the detenu. In the instant case, if affidavit or the grounds of detention are considered, all that is recorded by the detaining authority is that the fear expressed by the witnesses is found to be genuine and correct by the detaining authority. The detaining authority has recorded that it has carefully scrutinized, examined and considered all the materials that were produced before him by the sponsoring authority. It is, therefore, clear that the detaining authority, while verifying the statements of the witnesses and while considering the question of exercising privilege under Sec. 9 (2) of the P.A.S.A. Act, has not taken any independent steps for considering general background, character, antecedents, criminal tendency etc. while recording subjective satisfaction, but has relied solely on the material produced by the sponsoring authority. There is no contemporaneous record to indicate the steps taken by the detaining authority and the grounds and reasons for arriving at the subjective satisfaction. It is therefore very difficult to conclude that the detaining authority has considered general background, character, antecedents, criminal tendency and propensity etc. of the detenu while arriving at the subjective satisfaction, for the need of exercise of powers under Sec. 9 (2) of the P.A.S.A. Act and claim privilege by not disclosing identity of the anonymous witnesses."

5. So far as the aforesaid aspect is concerned, the learned advocate for the petitioner has further submitted that there is nothing on record to show that the detaining authority has tried to find out the antecedents of the detenu and thus there is total non application of mind on the part of the detaining authority while claiming privilege under Section 9(2) of PASA, and therefore, on that ground also, the impugned order is required to be quashed and set aside.

6. So far as the aforesaid contentions are

concerned, no affidavit-in-reply is filed by the authority controverting the said contention nor is any file produced before the Court. In such type of cases, normally, reply is required to be filed, controverting the averments made in the petition; otherwise, it would be presumed that the averments made in the petition are correct because they stand uncontroverted. In view of the said aspect also, the averments made in this behalf are required to be accepted and, therefore, on this ground also, the petition is required to be allowed.

7. For the foregoing reasons, this petition is allowed. The order of detention dated 21.1.2004 is quashed and set aside. The detenu, Amrutbhai Chhaniyabhai Tandel, is ordered to be set at liberty forthwith, if he is not required in connection with any other case.

8. At this stage, learned advocate for the petitioner has voluntarily made a statement that the petitioner will not leave the Jalalpore Taluka, District Navsari, upto 31st October, 2004, unless he is required to appear in any other case for attending the court. Learned advocate for the petitioner has further submitted that he is making the statement after taking instructions from the petitioner. The Concerned Police Officer may also monitor this aspect so that the statement of the petitioner can be effectively taken care of by the authorities. Rule is made absolute to the aforesaid extent.

(P.B. Majmudar, J.)

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